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TENAGA NASIONAL BHD v. CHEW THAI KAY & ANOR

FEDERAL COURT, PUTRAJAYA
AZAHAR MOHAMED CJ (MALAYA)
MOHD ZAWAWI SALLEH FCJ
VERNON ONG LAM KIAT FCJ
B ZALEHA YUSOF FCJ
RHODZARIAH BUJANG FCJ
[CIVIL APPEAL NO: 02(i)-28-07-2020 (A)]
4 JANUARY 2022

C

Abstract – *The statutory power of Tenaga Nasional Berhad (TNB) to disconnect electricity to a customer's premises pursuant to the discovery of meter tampering, which it may resort to under s. 38(1) of the Electricity Supply Act 1990 (ESA), abates once it remedies and rectifies the tampering or the impugned meter. TNB cannot thereafter disconnect supply on the ground that an offence under s. 37(1) of ESA had been committed, as its power to disconnect can only remain extant and exercisable in the presence of a continuing offence, and not otherwise. Whether it be the old or the amended s. 38(1) of ESA, the section does not allow for future disconnection of electricity in circumstances where the offence under s. 37(1) was in the past and was no longer being continued by the customer. To that extent, any loss of revenue suffered by TNB in the circumstance may only be recovered by way of a civil action under s. 38(5) of ESA.*

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UTILITIES: *Electric supply – Disconnection – Discovery of meter tampering at consumer's premises – Tampered meter rectified and replaced – Electricity supplier sent notice of disconnection – Whether electricity supplier could lawfully invoke amended s. 38(1) of Electricity Supply Act 1990 to disconnect electricity – Whether there must be continuing offence to invoke power of disconnection – Whether there was subsisting offence under s. 37(1) authorising disconnection – Balance of competing interest within scheme of Electricity Supply Act 1990 – Whether prerequisite for electricity supplier to disconnect supply before issuing statutory written statement to consumer*

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This appeal was primarily related to the statutory power of Tenaga Nasional Berhad ('TNB') to disconnect the supply of electricity to a consumer pursuant to s. 38(1) of the Electricity Supply Act 1990 ('ESA'). TNB was the sole provider of electricity in Peninsular Malaysia while the first respondent was the registered user of electricity supply at the premises ('premises'). At all material times, the second respondent was a commercial enterprise and carried out the business of seafood processing, freezing and

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cold storage at the premises. The second respondent purchased the premises from the first respondent but nevertheless, the supply of electricity continued under the name of the first respondent, who remained the registered consumer with TNB. On 7 June 2018, TNB carried out an inspection on its meter installation at the premises and discovered that there had been a tampering of the meter. The meter tampering, according to TNB, meant that the impugned meter could not and therefore did not during the material times correctly record the actual utilisation of electricity by the second respondent as supplied by TNB. The meter was then rectified by TNB. After replacing the impugned meter and continuing to supply electricity to the premises, TNB issued a notice of disconnection, intending to disconnect electricity on 3 July 2018. In the meantime, by way of a letter dated 8 June 2018, TNB informed the Energy Commission of its findings at the premises that an offence had been committed under s. 37(1), (3) or (14) of the ESA, which was done in compliance with TNB's obligation under s. 38(1). Consequently, concerned by the upcoming disconnection which would severely impact the second respondent's business activities, the respondents commenced an action in the High Court against TNB, *inter alia*, for the following reliefs; (i) a declaration that the disconnection notice to disconnect the supply of electricity at the second respondent's premises was unlawful; and (ii) an injunction where TNB be restrained from carrying out the disconnection of electricity supply at the said premises. The following day, the respondents filed an application for an interim injunction to restrain TNB from disconnecting the supply of electricity to the second respondent's premises pending disposal of the main action. The respondents were granted an *ex parte* interim injunction order restraining TNB from disconnecting the electricity supply to the premises pending disposal of the *inter partes* hearing. At the *inter partes* hearing of the injunction, the High Court allowed the respondents' injunction application, and it was this decision that was the subject matter of the present appeal. In giving judgment in favour of the respondents, the High Court held, *inter alia*, that once a tampered meter had been rectified by TNB and the offence of meter tampering was no longer continuing, TNB had no power to issue the notice of disconnection under s. 38(1) of the ESA. The Court of Appeal agreed with the High Court and applied the principle of law as decided by the Court of Appeal in *Tenaga Nasional Bhd v. Mayaria Sdn Bhd & Anor* ('*Mayaria* CA') which was subsequently affirmed by the Federal Court whereby it was held that TNB could not disconnect electricity supply after the impugned meter had been rectified. The Court of Appeal further held that the position of law did not change despite the amendment to s. 38(1) of the ESA. For the benefit of the business or industry and large segment of the customers concerned, TNB was given leave to appeal to the Federal Court on three questions of law (i) whether the statutory power conferred on TNB under the amended s. 38(1) of the ESA to disconnect the supply of electricity could be prohibited by implied limitations on the exercise of power, namely

A that the power must be exercised immediately upon discovery of meter tampering and/or in any event, before the tampered meter was rectified; (ii) whether TNB's exercise of the statutory power to disconnect the supply of electricity under the amended s. 38(1) of the ESA could be precluded or prevented without express prohibitions in the ESA on the exercise of such B power; and (iii) whether under the amended s. 38(4) of the ESA, it was a prerequisite for TNB to disconnect electricity supply before it was able to issue the statutory written statement to its consumer and rely upon the same as *prima facie* evidence of the payment that had to be made by the consumer under s. 38(3) of the ESA.

C **Held (dismissing appeal with costs)**
Per Azahar Mohamed CJ (Malaya) delivering the judgment of the court:

(1) Since TNB's inspection and discovery of the meter tampering was made on 7 June 2016, the current s. 38(1) applied. The said amendment came into effect on 1 January 2016. This court noted three things about the D amendment. First, the phrase 'in his opinion' was replaced with 'gives reasonable grounds for him to believe'. Secondly, the words 'twenty four hours notice' were substituted with 'forty eight hours notice'. Thirdly, an additional statutory requirement was imposed on TNB to 'within three working days from the date of such finding inform the E Commission in writing'. When Parliament replaced the word 'in his opinion' with the expression 'reasonable grounds for him to believe', it was intended that TNB be subjected to a higher standard of proof, which is a higher evidential threshold. The legislative intention behind the amendment to increase the period of notice to be given to consumers F from 24 hours to 48 hours is to give further protection to the consumers by giving the consumers longer time to prepare for the disconnection. The additional statutory requirement to include the involvement of the Electricity Commission serves to inform the Commission of TNB's finding and allow the Electricity Commission to intervene and verify TNB's finding as to whether an offence had indeed been committed. The G amended s. 38(1) is an enhancement on the protection to the consumers. As a matter of fact, the amended s. 38(1) rendered it more onerous and stringent for TNB to disconnect electricity supply. There is no substantive distinction between the pre and post amendment of s. 38(1). The amendment had not altered the position as determined by this court H in affirming the Court of Appeal's decision in *Mayaria* FC. The position of law now, as then, is that once the impugned meter had been rectified and/or replaced with a new meter and TNB no longer suffered losses, TNB could not lawfully invoke the amended s. 38(1) to disconnect electricity to the consumer's premises. (paras 24 & 26-28)

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(2) From the reading of s. 38(1) before and after its amendment, the operative word 'finds' remains the same after its amendment. The operative word is in its present tense *ie*, finds and not in its past tense, 'found'. The choice of words '[w]here any person employed by a licensee finds upon any premises evidence which gives reasonable grounds for him to believe than an offence has been committed ...' is very clear to indicate that the requirement of a finding of meter tampering is the singular factor to trigger powers of disconnection. This is the basic condition that must be fulfilled to invoke the power of disconnection. The evidence requirement constitutes the pillar of the scheme of the statutory power for TNB as the licensee to disconnect electricity upon finding of an offence under sub-ss. 37(1), (3) and (14) of the ESA. It was clear and plain that only by a finding of evidence of meter tampering, TNB is empowered for disconnection, subject to subsequent limitation and prohibition expressly provided. (para 37)

(3) If there was no evidence of meter tampering, there was no offence committed and there was no lawful power for disconnection. This clearly showed that Parliament intended for the subsequent action to be taken presently, urgently and expeditiously (*ie*, immediately upon discovery of any tampering) and not in the future (*ie*, long after discovery of any tampering, much less after the tampered meter had been rectified and/or replaced). When one carefully looks at the provisions, what stands out is that s. 38(1) forms on specific time frame and process. It begins from the finding of evidence of offence, fulfilling prescribed requirements and completed by the cause of disconnection. One single sentence of the provision, formed the complete processes which TNB had to follow in achieving the power of disconnection. The grammatical construction of 'an offence has been committed' to negate the continuing and existing offence as suggested in the case of *Karun Klasik Sdn Bhd v. Tenaga Nasional Bhd* ('*Karun Klasik*') was far less persuasive because the contextual plain meaning formed the specific processes leading to 'cause the supply of electricity to be disconnected from the premises'. It was in this aspect that there must be a continuing offence to invoke the power of disconnection. It must necessarily follow, where there is a further discovery of meter tampering after rectification is done of the previous tampering, TNB can immediately utilise the power of disconnection under s. 38(1) provided that it takes no step to all over again rectify the subsequent tampering. That was, however, never the case here. (para 37)

(4) When TNB issued the notice of disconnection there was no longer any issue of meter tampering at the respondents' premises as the alleged unlawful activity had already ended due to the rectification and replacement of the impugned meter with a new meter, and electricity was continued to be supplied after that. The tampered meter was

remedied on the same day of inspection and discovery by TNB. The unauthorised interference of the meter at the respondents' premises had been discontinued and thus any further presumed loss of electricity ceased to be an issue. When the notice of disconnection was served on the respondents, there was no longer any defective meter or offending device to facilitate the continuation of offence under s. 37(1) as rectification work was carried out and completed by TNB. The alleged offence under s. 37(1) was therefore a past offence. After rectification and replacement on 7 June 2008, there was no issue of any offence being committed since the supply of electricity to the premises was properly and accurately recorded. The language of s. 38(1) does not allow for future disconnection of electricity in circumstances where the offence under s. 37(1) was in the past and was no longer being continued. Flowing from the provisions, for the notice of disconnection issued by TNB against the respondents to be good in law under s. 38(1), the offence under s. 37(1) must still be on-going or continuing. (para 38)

(5) Once the impugned meter had been replaced and the offence under s. 37(1) was no longer extant, TNB does not have the valid power to issue the notice of disconnection under s. 38(1). If the loss of revenue was to be recovered, then it could be done by way of a civil action under s. 38(5). Section 38(1) was enacted to give TNB effective powers to instantly prevent any offence that may be committed and not to be left unattended or unabated. It empowered TNB to act expeditiously to prevent misuse such as electricity theft and to give TNB the power to act swiftly to prevent further losses. TNB's power to disconnect electricity pursuant to s. 38(1) is both immediate and interim in nature. On the facts of the present case, there was no longer any continuation of meter tampering and there was no subsisting offence under s. 37(1) which authorised TNB to use its disconnection power of electricity under s. 38(1) to the respondents' premises. (para 39)

(6) Ultimately, it is a question of balancing competing interests. The evidence finding factor holds neither the TNB the untrammelled powers in exercising their powers to disconnect electricity to the consumers, nor do the consumers have the opportunity to connive and be exonerated from the offence of meter tampering. TNB is still accorded the right to recover the loss of revenue by way of a civil action under s. 38(5) or by pursuing criminal prosecution against errant consumers who surreptitiously and deviously rectified the tampered meter. This is the balance of the competing interest which the scheme of the ESA seeks to uphold. Section 38(1) of the ESA requires evidence of meter tampering to justify disconnection. Once the impugned meter had been rectified, there was no longer any issue of meter tampering and thus the offence under s. 37(1) was no longer extant. Nowhere in the ESA is it stated that TNB may proceed under s. 38(1) to compel payment for the loss of revenue. The only recourse available to TNB in such a situation is

provided for under s. 38(5) where it allows TNB to file a civil action for the recovery of loss revenue. TNB cannot have the best of both worlds and a second bite of the cherry fruiting from their deliberate course of action. Where a statute creates a right and, in plain language, gives a specific remedy for its enforcement, a party seeking to enforce the right must resort to that remedy and not to others. (para 40)

(7) In consequence and in light of all the above, the answers to the legal issues posed under questions 1 and 2 are as follows. TNB has no lawful power to disconnect a consumer electricity supply pursuant to the current s. 38(1) of the ESA once the impugned meter has been rectified and replaced, and the offence under s. 37 is no longer subsisting and cease to exist at the material time when the notice of disconnection is issued to the customer. (para 41)

(8) The written statement under s. 38(4) is for the purposes of TNB's civil action for recovery of loss of revenue under s. 38(5). It stands as the *prima facie* evidence of the payment that must be made by the consumer under s. 38(3). Parliament had intended to give TNB an evidential advantage *via* the written statement. The amount stated in it is *prima facie* evidence of the loss of revenue that the consumer must pay for meter tampering. The amended s. 38(1) provides that 'the licensee ... may upon giving not less than forty eight hours' notice ... cause the supply of electricity to be disconnected from the said premises'. Clearly, TNB has the discretion to choose whether to exercise the power to disconnect the supply of electricity to the consumer's premises upon giving the requisite statutory notice. Viewed in this way, this requirement in the amended s. 38(4) appears incongruous with the amended s. 38(1), which retains TNB's discretion to disconnect. This would lead to an unworkable situation where TNB would need to disconnect in every circumstance that it wishes to rely on the written statement as *prima facie* evidence under s. 38(4) when bringing a civil claim under s. 38(5), or wishes to at least have the option to do so. (paras 46 & 47)

(9) In this court's view, the amended s. 38(4) operates in this manner. In the event of disconnection, should TNB comply with the requirement under s. 38(4) in issuing the written statement within 14 days after disconnection, TNB will enjoy *prima facie* advantage accorded to them. The provision sought to impose a time limit on TNB to issue a written statement to its consumers only in the event of disconnection, but no restriction is imposed on TNB if there is no disconnection. Hence, in the event of no disconnection, TNB can still issue the written statement for loss of revenue under s. 38(4) and claim for such loss in civil court. No time limit or restriction is imposed on TNB to issue the written statement in the event of no disconnection and TNB retains the benefit of *prima facie* advantage under s. 38(4). It would be absurd to require TNB to disconnect supply for the sake of relying on the written

statement. It would also be contrary to the intention of Parliament in amending s. 38(1) that there can only be disconnection in clear and proven cases of electricity theft under the ESA. Based on the above, question 3 should be answered in the negative (paras 48 & 49)

Bahasa Melayu *Headnotes*

Rayuan ini berkaitan dengan kuasa undang-undang Tenaga Nasional Berhad ('TNB') untuk memotong bekalan elektrik kepada pengguna menurut s. 38(1) Akta Bekalan Elektrik 1990 ('ABE'). TNB adalah satu-satunya pembekal elektrik di Semenanjung Malaysia sementara responden pertama adalah pengguna bekalan elektrik yang berdaftar di sebuah premis ('premis'). Pada setiap masa material, responden kedua adalah sebuah perusahaan komersial dan menjalankan perniagaan pemprosesan, pembekuan dan penyimpanan makanan laut di premis. Responden kedua membeli premis tersebut daripada responden pertama tetapi bekalan elektrik berterusan dengan nama responden pertama, yang kekal sebagai pengguna berdaftar TNB. Pada 7 Jun 2018, TNB menjalankan pemeriksaan pada pemasangan meternya di premis dan mendapati terdapat gangguan pada meter. Gangguan meter, menurut TNB, bermaksud bahawa meter yang disanggah tidak boleh dan oleh itu tidak pada masa material dengan betul mencatat penggunaan elektrik sebenar oleh responden kedua seperti yang dibekalkan oleh TNB. Meter kemudian diperbaiki oleh TNB. Setelah menggantikan meter yang disanggah dan meneruskan pembekalan elektrik ke premis, TNB mengeluarkan notis pemotongan, bertujuan untuk memutuskan pembekalan elektrik pada 3 Julai 2018. Sementara itu, melalui surat bertarikh 8 Jun 2018, TNB memberitahu Suruhanjaya Tenaga ('Suruhanjaya') tentang dapatannya di premis bahawa kesalahan telah dilakukan bawah s. 37(1), (3) atau (14) ABE, yang mematuhi kewajipan TNB bawah s. 38(1). Akibatnya, prihatin dengan pemotongan akan datang yang akan memberi kesan buruk pada aktiviti perniagaan responden kedua, responden-responden memulakan tindakan di Mahkamah Tinggi terhadap TNB, antara lain, untuk relief-relief berikut; (i) perisytiharan bahawa notis pemotongan untuk memotong bekalan elektrik di premis responden kedua adalah tidak sah; dan (ii) perintah untuk TNB dihalang daripada melakukan pemotongan bekalan elektrik di premis tersebut. Keesokan harinya, responden-responden memfailkan permohonan perintah injunksi interim untuk menghalang TNB daripada memotong bekalan elektrik ke premis responden kedua sementara menunggu keputusan guaman utama. Responden diberi perintah injunksi interim yang menghalang TNB untuk memotong bekalan elektrik ke premis sementara menunggu pelupusan perbicaraan *inter parte*. Pada perbicaraan perintah *inter parte* injunksi, Mahkamah Tinggi membenarkan permohonan injunksi responden-responden, dan keputusan inilah yang menjadi subjek perkara rayuan ini. Dalam memberikan pertimbangan yang memihak kepada responden-responden, Mahkamah Tinggi memutuskan, antara lain, bahawa setelah meter yang diganggu telah diperbaiki oleh TNB dan kesalahan gangguan

meter tidak lagi berterusan, TNB tidak mempunyai kuasa untuk mengeluarkan notis pemotongan bawah s. 38(1) ABE. Mahkamah Rayuan bersetuju dengan Mahkamah Tinggi dan mengguna pakai prinsip undang-undang seperti yang diputuskan oleh Mahkamah Rayuan dalam *Tenaga Nasional Bhd v. Mayaria Sdn Bhd & Anor* ('*Mayaria* MR') yang kemudiannya disahkan oleh Mahkamah Persekutuan yang memutuskan bahawa TNB tidak dapat memotong bekalan elektrik setelah meter yang disanggah diperbaiki. Mahkamah Rayuan selanjutnya berpendapat bahawa kedudukan undang-undang tidak berubah walaupun terdapat pindaan pada s. 38(1) ABE. Untuk kepentingan perniagaan atau industri dan segmen besar pelanggan-pelanggan yang berkaitan, TNB diberi kebenaran untuk mengemukakan rayuan kepada Mahkamah Persekutuan atas tiga persoalan undang-undang (i) sama ada kuasa berkanun yang diberikan kepada TNB bawah s. 38(1) ABE yang dipinda untuk memotong bekalan elektrik boleh dilarang oleh batasan tersirat dalam pelaksanaan kuasa, iaitu bahawa kuasa mesti dilaksanakan dengan segera setelah dapatan gangguan meter dan/atau dalam keadaan apa pun, sebelum meter yang diganggu diperbaiki; (ii) sama ada pelaksanaan kuasa berkanun TNB untuk memotong bekalan elektrik bawah s. 38(1) ABE yang dipinda boleh dihalang atau dicegah tanpa larangan nyata dalam ABE mengenai pelaksanaan kuasa tersebut; dan (iii) sama ada bawah s. 38(4) ABE yang dipinda, adakah satu prasyarat bagi TNB untuk memotong bekalan elektrik sebelum mengeluarkan pernyataan bertulis berkanun kepada penggunanya dan bergantung pada yang sama sebagai bukti *prima facie* mengenai pembayaran yang harus dibayar oleh pengguna bawah s. 38(3) ABE.

Diputuskan (menolak rayuan dengan kos)
Oleh Azahar Mohamed HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Oleh kerana pemeriksaan dan penemuan gangguan meter TNB dilakukan pada 7 Jun 2016, s. 38(1) semasa diguna pakai. Pindaan tersebut berkuat kuasa pada 1 Januari 2016. Mahkamah ini mencatat tiga perkara tentang pindaan tersebut. Pertama, ungkapan 'menurut pendapatnya' digantikan dengan 'memberi alasan yang munasabah untuk dia percayai'. Kedua, perkataan 'notis dua puluh empat jam' digantikan dengan 'notis empat puluh lapan jam'. Ketiga, syarat undang-undang tambahan dikenakan kepada TNB untuk 'dalam masa tiga hari bekerja dari tarikh dapatan itu memaklumkan Suruhanjaya secara bertulis'. Ketika Parlimen mengganti perkataan 'menurut pendapatnya' dengan ungkapan 'alasan yang munasabah untuk dia mempercayai', itu bertujuan agar TNB dikenakan standard bukti yang lebih tinggi, iaitu ambang bukti yang lebih tinggi. Tujuan perundangan sebalik pindaan untuk mempertingkatkan jangka waktu pemberitahuan yang akan

diberikan kepada pengguna dari 24 jam hingga 48 jam adalah untuk memberikan perlindungan lebih lanjut kepada pengguna dengan memberi pengguna waktu yang lebih lama untuk bersiap sedia untuk pemotongan. Keperluan statutori tambahan untuk memasukkan penglibatan Suruhanjaya berfungsi untuk memaklumkan Suruhanjaya berkenaan dapatan TNB dan membenarkan Suruhanjaya campur tangan dan mengesahkan dapatan TNB mengenai sama ada kesalahan itu telah dilakukan. Seksyen 38(1) yang dipinda adalah peningkatan perlindungan kepada pengguna. Seksyen 38(1) yang dipinda menjadikannya lebih membebankan dan ketat bagi TNB untuk memotong bekalan elektrik. Tiada perbezaan yang substansial antara s. 38(1) belum dipinda dan s. 38(1) selepas dipinda. Pindaan tersebut tidak mengubah kedudukan sebagaimana ditentukan oleh mahkamah ini dalam mengesahkan keputusan Mahkamah Rayuan di *Mayaria* FC. Kedudukan undang-undang sekarang, seperti sebelum ini, adalah bahawa setelah meter yang disanggah diperbaiki dan/atau diganti dengan meter baharu dan TNB tidak lagi mengalami kerugian, TNB tidak dapat mengguna pakai s. 38(1) yang dipinda secara sah untuk memotong elektrik ke premis pengguna.

(2) Berdasarkan pembacaan s. 38(1) sebelum dan sesudah pindaannya, kata operasi 'mendapati' tetap sama dengan setelah pindaannya. Kata operasi masa kini adalah 'mendapati' dan bukan pada masa lalu, 'didapati'. Pilihan perkataan 'Jika mana-mana orang yang diambil kerja oleh pemegang lesen mendapati keterangan di mana-mana premis yang memberikan alasan yang munasabah untuk dia mempercayai bahawa satu kesalahan telah dilakukan ...' sangat jelas untuk menunjukkan bahawa syarat mencari gangguan meter adalah faktor tunggal untuk mencetuskan kuasa pemotongan. Ini adalah syarat asas yang mesti dipenuhi untuk menggunakan kuasa pemotongan. Keperluan keterangan membentuk tiang skema kuasa berkanun bagi TNB sebagai pemegang lesen untuk memotong bekalan elektrik setelah mendapati kesalahan bawah sub-ss. 37(1), (3) dan (14) ABE. Jelas dan terang bahawa hanya dengan dapatan keterangan gangguan meter, TNB diberi kuasa untuk membuat pemotongan, tertakluk kepada batasan dan larangan yang dinyatakan secara jelas. (para 37)

(3) Jika tiada keterangan gangguan meter, tiada kesalahan yang dilakukan dan tiada kuasa yang sah untuk pemotongan. Ini jelas menunjukkan bahawa Parlimen bermaksud tindakan selanjutnya diambil pada masa kini, segera dan cepat (iaitu sebaik sahaja mengetahui terdapat sebarang gangguan) dan tidak pada masa akan datang (lama selepas dapatan sebarang gangguan, lebih kurang setelah meter yang diganggu diperbaiki dan/atau diganti). Apabila seseorang meneliti peruntukan-peruntukan,

yang menonjol adalah s. 38(1) terbentuk pada jangka waktu dan proses tertentu. Ini bermula dari dapatan keterangan kesalahan, memenuhi syarat yang ditetapkan dan diselesaikan dengan punca pemotongan. Satu ayat peruntukan, membentuk proses lengkap yang harus diikuti oleh TNB dalam mencapai kuasa pemotongan. Tafsiran tatabahasa 'suatu kesalahan telah dilakukan' untuk meniadakan kesalahan yang berterusan dan wujud seperti yang disarankan dalam kes *Karun Klasik Sdn Bhd v. Tenaga Nasional Bhd* ('*Karun Klasik*') kurang meyakinkan kerana makna jelas kontekstual membentuk proses khusus yang membawa kepada 'menyebabkan bekalan elektrik terpotong dari premis'. Dalam aspek inilah mesti ada kesalahan berterusan untuk menggunakan kuasa pemotongan. Ini mesti diikuti, di mana terdapat dapatan lebih lanjut mengenai gangguan meter setelah pembetulan dilakukan terhadap gangguan sebelumnya, TNB dapat segera menggunakan kuasa pemotongan di bawah s. 38(1) dengan syarat tidak perlu mengambil langkah untuk memperbaiki lagi gangguan seterusnya. Namun, perkara itu tidak berlaku di sini. (para 37)

(4) Ketika TNB mengeluarkan notis pemotongan, tiada lagi masalah gangguan meter di premis responden kerana aktiviti yang didakwa menyalahi undang-undang telah berakhir kerana pembetulan dan penggantian meter yang disanggah dengan meter baharu, dan tenaga elektrik terus dibekalkan selepas itu. Meter yang diganggu telah diperbaiki pada hari pemeriksaan dan penemuan yang sama oleh TNB. Gangguan meter yang tidak dibenarkan di premis responden telah dihentikan dan dengan itu sebarang kehilangan elektrik tidak lagi menjadi isu. Semasa notis pemotongan diserahkan kepada responden, tiada lagi meter yang rosak atau alat yang bermasalah untuk memudahkan kesalahan diteruskan bawah s. 37(1) kerana kerja-kerja memperbaiki telah dijalankan dan diselesaikan oleh TNB. Kesalahan yang didakwa bawah s. 37(1) oleh itu adalah kesalahan lalu. Selepas pembaikan dan pembetulan pada 7 Jun 2008, tiada isu berkenaan apa-apa kesalahan dilakukan kerana pembekalan tenaga elekrik kepada premis direkodkan dengan betul dan tepat. Bahasa s. 38(1) tidak membenarkan pemotongan elektrik akan datang dalam keadaan kesalahan bawah s. 37 adalah pada masa lalu dan tidak lagi diteruskan. Mengalir daripada peruntukan, untuk notis pemotongan yang dikeluarkan oleh TNB terhadap responden-responden diterima dari segi undang-undang bawah s. 38(1), kesalahan bawah s. 37(1) mesti berterusan.

(5) Setelah meter yang disanggah diganti dan kesalahan bawah s. 37(1) tidak wujud lagi, TNB tidak memiliki kuasa yang sah untuk mengeluarkan notis pemotongan bawah s. 38(1). Sekiranya kehilangan pendapatan

dapat dipulihkan, maka ini dapat dilakukan melalui tindakan sivil bawah s. 38(5). Seksyen 38(1) digubal untuk memberikan TNB kuasa yang efektif untuk mencegah pelanggaran yang mungkin dilakukan dan tidak dibiarkan tanpa pengawasan atau tanpa henti. Ini memberi kuasa kepada TNB untuk bertindak dengan cepat untuk mencegah penyalahgunaan seperti pencurian elektrik dan memberi TNB kuasa untuk bertindak pantas untuk mencegah kerugian lebih lanjut. Kuasa TNB untuk memotong sambungan elektrik mengikut s. 38(1) bersifat langsung dan sementara. Mengenai fakta kes ini, tidak ada lagi kelanjutan gangguan meter dan tidak ada kesalahan yang berlaku bawah s. 37(1) yang memberi kuasa kepada TNB untuk menggunakan kuasa pemotongan tenaga elektrik bawah s. 38(1) ke premis responden.

(6) Akhirnya, ini adalah persoalan mengimbangi kepentingan bersaing. Faktor dapatan keterangan tidak memberi TNB kuasa tidak terhalang dalam menjalankan kuasa mereka untuk memotong tenaga elektrik kepada pengguna, atau pengguna tidak berpeluang untuk menipu dan dibebaskan dari kesalahan gangguan meter. TNB masih diberi hak untuk mendapatkan kembali kerugian pendapatan melalui tindakan sivil bawah s. 38(5) atau dengan meneruskan pendakwaan jenayah terhadap pengguna yang salah yang secara diam-diam dan dengan sengaja memperbaiki meter yang diganggu. Inilah keseimbangan kepentingan bersaing yang ingin dijunjung oleh skema ESA. Seksyen 38(1) ABE memerlukan bukti gangguan meter untuk membenarkan pemotongan. Setelah meter yang disanggah diperbaiki, tidak ada lagi masalah gangguan meter dan dengan itu kesalahan bawah s. 37(1) tidak lagi wujud. Tidak terdapat dalam ESA apa-apa yang menyatakan bahawa TNB dapat meneruskan bawah s. 38(1) untuk memaksa pembayaran atas kerugian pendapatan. Satu-satunya jalan keluar yang tersedia untuk TNB dalam keadaan seperti ini adalah bawah s. 38(5) yang membolehkan TNB memfailkan tindakan sivil untuk pemulihan kerugian pendapatan. TNB tidak dapat memperoleh yang terbaik dari kedua-dua dunia dan memperoleh peluang kedua dari hasil tindakan mereka yang disengajakan. Apabila undang-undang menciptakan hak dan, dalam bahasa biasa, memberikan penyelesaian khusus untuk penguatkuasaannya, pihak yang ingin menegakkan hak harus menggunakan jalan keluar itu dan bukan jalan yang lain.

(7) Akibatnya dan berdasarkan semua perkara di atas, jawapan kepada isu undang-undang yang diajukan di bawah soalan-soalan 1 dan 2 adalah seperti berikut. TNB tidak mempunyai kuasa yang sah untuk memotong bekalan tenaga elektrik pengguna berdasarkan peruntukan semasa s. 38(1) ABE setelah meter yang disanggah diperbaiki dan diganti, dan kesalahan di bawah s. 37 tidak lagi ada dan tidak lagi wujud pada waktu material apabila notis pemotongan dikeluarkan kepada pelanggan.

(8) Penyataan bertulis bawah s. 38(4) adalah untuk tujuan tindakan sivil TNB untuk pemulihan kerugian pendapatan bawah s. 38(5). Ini adalah bukti *prima facie* mengenai pembayaran yang mesti dibuat oleh pengguna bawah s. 38(3). Parlimen berhasrat untuk memberikan TNB kelebihan bukti melalui pernyataan bertulis. Jumlah yang dinyatakan adalah bukti *prima facie* mengenai kerugian pendapatan yang mesti dibayar oleh pengguna untuk gangguan meter. Seksyen 38(1) yang dipinda memperuntukkan bahawa 'pemegang lesen ... boleh dengan memberikan notis tidak kurang daripada empat puluh lapan jam ... menyebabkan bekalan elektrik dipotong daripada premis tersebut'. Jelas, TNB mempunyai budi bicara untuk memilih sama ada menggunakan kuasa untuk memotong bekalan elektrik ke premis pengguna setelah memberikan notis statutori yang diperlukan. Dilihat dengan cara ini, syarat ini dalam s. 38(4) yang dipinda kelihatan tidak selaras dengan s. 38(1) yang dipinda, yang mengekalkan budi bicara TNB untuk membuat pemotongan. Ini akan menyebabkan situasi yang tidak dapat dilaksanakan di mana TNB perlu membuat pemotongan dalam setiap keadaan yang bergantung pada pernyataan bertulis sebagai bukti *prima facie* bawah s. 38(4) semasa mengemukakan tuntutan sivil bawah s. 38(5), atau sekurang-kurangnya mempunyai pilihan untuk melakukannya.

(9) Pada pandangan mahkamah ini, s. 38(4) yang dipinda beroperasi dengan cara ini. Sekiranya terpotong, jika TNB mematuhi syarat bawah s. 38(4) dalam mengeluarkan pernyataan bertulis dalam 14 hari setelah pemotongan, TNB akan menikmati kelebihan *prima facie* yang diberikan kepada mereka. Peruntukan tersebut bertujuan untuk mengenakan had waktu kepada TNB untuk mengeluarkan pernyataan bertulis kepada penggunanya hanya sekiranya terdapat pemotongan, tetapi tidak ada sekatan yang dikenakan pada TNB jika tidak ada pemotongan. Oleh itu, sekiranya tiada pemotongan, TNB masih boleh mengeluarkan penyata bertulis untuk kerugian pendapatan bawah s. 38(4) dan tuntutan kerugian tersebut di mahkamah sivil. Tiada had masa atau sekatan yang dikenakan pada TNB untuk mengeluarkan pernyataan bertulis sekiranya tiada pemotongan dan TNB mengekalkan faedah kelebihan *prima facie* bawah s. 38(4). Adalah tidak masuk akal untuk meminta TNB memotong bekalan demi bergantung pada pernyataan bertulis. Ini juga bertentangan dengan hasrat Parlimen dalam meminda s. 38(1) bahawa hanya ada pemotongan dalam kes pencurian elektrik yang jelas dan terbukti bawah ABE. Berdasarkan perkara di atas, soalan 3 harus dijawab secara negatif.

Case(s) referred to:

Adil Juta Sdn Bhd v. Tenaga Nasional Bhd [2014] 1 LNS 1022 HC ***(refd)***
Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 3 CLJ 153 FC ***(refd)***
Big Man Management Sdn Bhd v. Tenaga Nasional Bhd [2020] 8 CLJ 27 HC ***(refd)***
Butool Begum v. The State AIR 1956 Hyderabad 26 ***(refd)***
Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd [2006] 4 CLJ 892 CA ***(refd)***
Davis v. Johnson [1978] 1 All ER 1132 ***(refd)***
Dwarika Prosad v. Dr BK Roy Choudhary AIR 1950 Cal 349 ***(refd)***
Karun Klasik Sdn Bhd v. Tenaga Nasional Bhd [2018] 9 CLJ 184 CA ***(refd)***
Kejuruteraan Bintai Kindenko Sdn Bhd v. Fong Soon Leong [2021] 5 CLJ 1 CA ***(refd)***
Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 3 CLJ 577 FC ***(refd)***
Manggai v. Government of Sarawak & Anor [1970] 1 LNS 80 FC ***(refd)***
Mayaria Sdn Bhd & Anor v. Tenaga Nasional Bhd [2015] 6 CLJ 788 HC ***(foll)***
Merck Sharp & Dohme Group & Anor v. Hovid Bhd [2019] 9 CLJ 1 FC ***(refd)***
Mesuma Sports Sdn Bhd v. Majlis Sukan Negara Malaysia; Pendaftar Cap Dagangan Malaysia (Interested Party) [2015] 9 CLJ 125 FC ***(refd)***
Modernria Plastic Industries (M) Sdn Bhd v. Tenaga Nasional Bhd [2015] 3 CLJ 825 HC ***(foll)***
P H Hendry v. George John De Cruz [1949] Supp MLJ 25 ***(refd)***
QL Endau Marine Products Sdn Bhd v. Tenaga Nasional Bhd [2020] 1 LNS 1643 HC ***(refd)***
Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561 FC ***(refd)***
Tenaga Nasional Bhd v. Mayaria Sdn Bhd (Civil Appeal No. 02(f)-28-05-03-2017(W)) (Unreported) ***(refd)***
Tenaga Nasional Bhd v. Evergrowth Aquaculture Sdn Bhd & Other Appeals [2021] 9 CLJ 179 FC ***(refd)***
Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals [2018] 3 CLJ 557 FC ***(refd)***
Tenaga Nasional Bhd v. Mayaria Sdn Bhd & Anor [2019] 8 CLJ 786 CA ***(refd)***
Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor And Other Applications [2011] 1 CLJ 51 FC ***(refd)***
The Registrar, University of Madras v. The Union of India (1995) 2 MJ 367 ***(refd)***
Union of India v. Deoki Nandan Aggarwal AIR 1992 SC 96 ***(refd)***
Union of India v. Kanahaya Lai Sham Lai AIR 1957 P H 117 ***(refd)***
Vengadasalam v. Khor Soon Weng & Ors [1985] 1 LNS 46 SC ***(refd)***
Wilkinson v. Barking Corp [1948] 1 KB 721 ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***
Xin Guan Premier Sdn Bhd v. Tenaga Nasional Bhd [2016] 1 CLJ 318 HC ***(foll)***
Young v. Bristol Aeroplane [1944] KB 718 ***(refd)***

Legislation referred to:

Electricity Supply Act 1990, ss. 5, 6, 37(1), (3), (14), 38(1), (1B), (2), (3), (4), (5)
Licensee Supply Regulations 1990, regs. 4, 7

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[Editor's note: Appeal from Court of Appeal; Civil Appeal No: A-02(IM)(NCVC)-521-03-2019 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Azahar Mohamed CJ (Malaya):

Introduction

[1] This appeal primarily relates to the statutory power of Tenaga Nasional Berhad ("TNB") to disconnect the supply of electricity to a consumer pursuant to s. 38(1) of the Electricity Supply Act 1990 ("the ESA"). In essence, we are asked to decide the scope and limitations of TNB's power under the ESA to lawfully terminate the supply of electricity to a customer's premises following the discovery of meter tampering which was subsequently remedied. The most important question in this appeal is whether the statutory power to discontinue electricity supply can be invoked by TNB in the absence of a continuing offence under s. 37 of the ESA or when the said offence is no longer extant. That is the question this judgment sets out to address.

[2] This appeal by TNB is brought from a judgment of the Court of Appeal, where leave to appeal had been granted by this court on 22 June 2020. By its judgment, the Court of Appeal dismissed an appeal by TNB against a judgment of the High Court which had allowed the respondents' injunction application restraining TNB from disconnecting the electricity supply to the respondents' premises.

The Parties

[3] TNB is a limited company incorporated under the Companies Act 1965. TNB is the sole licensee for the delivery and distribution of electricity under the ESA in Peninsular Malaysia. TNB's main business is the distribution and transmission of electrical power for domestic or industrial consumption. TNB is the sole provider of electricity in Peninsular Malaysia.

[4] The first respondent is the registered user of electricity supply at No. 1541, Lorong Kerapu, Taman Sejahtera, 36400 Hutan Melintang, Perak ("the premises"), who had applied for and obtained the supply of electricity from TNB. The first respondent is a registered customer of TNB.

[5] At all material times, the second respondent is a commercial enterprise and carries out the business of seafood processing, freezing and cold storage at the premises. The second respondent purchased the premises from the first respondent in 2009. Nevertheless, the supply of electricity continued under the name of the first respondent, who remained the registered consumer with TNB.

Factual Background

[6] The factual background leading to this appeal is quite simple and straightforward. We will only highlight very briefly the pertinent facts in so far they are relevant to the issues which arise for our decision in this instant

appeal. Not much was disputed although there was considerable disagreement flowing from the opposing contentions of the parties with regards to the implication of a particular undisputed fact, which is, that on 7 June 2018, TNB carried out an inspection on its meter installation at the premises and discovered that there had been a tampering of the meter. The meter tampering, according to TNB, meant that the impugned meter could not and therefore did not during the material times correctly record the actual utilisation of electricity by the second respondent as supplied by TNB. The meter was then rectified by TNB. As we shall see later, this is an important point that should be kept in mind as it has a far-reaching implication. After replacing the impugned meter and continuing to supply electricity to the premises, TNB issued a notice of disconnection, intending to disconnect electricity on 3 July 2018. In the meantime, by way of a letter dated 8 June 2018, TNB informed the Energy Commission of its findings at the premises that an offence has been committed under s. 37(1), (3) or (14) of the ESA. This was done in compliance with TNB's obligation under s. 38(1).

The High Court Proceedings

[7] Electricity is a basic necessity and the lifeblood of businesses. Consequently, concerned by the upcoming disconnection which would severely impact the second respondent's business activities, the respondents as plaintiffs expeditiously on 27 June 2018 commenced an action in the High Court against TNB, *inter alia*, for the following relief:

(i) a declaration that the respondents did not tamper or adjust the meter in respect of the inspection of the meter on 7 June 2018 at the premises;

(ii) a declaration that the disconnection notice based on the inspection of the meter on 7 June 2018 to disconnect the supply of electricity at the second respondent's premises was unlawful;

(iii) an injunction where TNB be restrained from carrying out the disconnection of electricity supply at the said premises based on the inspection of the meter on 7 June 2018; and

(iv) if the electricity supply had been disconnected, the respondents pray for a mandatory injunction for the reconnection of electricity supply to the second respondent's premises with immediate effect once the order is served on TNB.

[8] The following day, on 28 June 2018, the respondents filed an application for an interim injunction to restrain TNB from disconnecting supply of electricity to the second respondent's premises pending disposal of the main action. On 29 June 2018, the respondents were granted an *ex parte* interim injunction order restraining TNB from disconnecting the electricity supply to the premises pending disposal of the *inter partes* hearing.

Decision Of The High Court Which Is The Subject Of This Appeal

[9] At the *inter partes* hearing of the injunction on 28 February 2019, the High Court allowed the respondents' injunction application until the disposal of the respondents' main action against TNB, and it is this decision that is the subject matter of the present appeal before us. In giving judgment in favour of the respondents, the High Court relied on a number of High Court decisions, namely *Modernria Plastic Industries (M) Sdn Bhd v. Tenaga Nasional Bhd* [2015] 3 CLJ 825 ("*Modernria*"), *Xin Guan Premier Sdn Bhd v. Tenaga Nasional Bhd* [2016] 1 CLJ 318; [2016] 10 MLJ 788 ("*Xin Guan Premier*") and *Mayaria Sdn Bhd & Anor v. Tenaga Nasional Bhd* [2015] 6 CLJ 788 ("*Mayaria* HC") which all held, *inter alia*, that once a tampered meter had been rectified by TNB and the offence of meter tampering was no longer continuing, TNB had no power to issue the notice of disconnection under s. 38(1) of the ESA.

Decision Of The Court Of Appeal

[10] On 6 December 2019, on appeal, the Court of Appeal agreed with the High Court and dismissed TNB's appeal. In dismissing the appeal by TNB, the Court of Appeal applied the principle of law as decided by the Court of Appeal in *Tenaga Nasional Bhd v. Mayaria Sdn Bhd & Anor* [2019] 8 CLJ 786; [2019] 2 MLJ 801 ("*Mayaria* CA") (which was subsequently affirmed by the Federal Court on 4 September 2019) whereby it was held that TNB cannot disconnect electricity supply after the impugned meter has been rectified. More importantly, as we shall see, in the context of the present appeal, the Court of Appeal further held that the position of law does not change despite the amendment to s. 38(1) of the ESA. In the words of the Court of Appeal at para 33:

> [33] ... However, upon perusal of the amended s. 38 of the Act, particularly subsection [4], we are unable to find the provision that enable the appellant as a provider of the electricity supply to disconnect the supply after the offending meter has been rectified or remedied and further loss of revenue has ceased. Therefore, in our view, the amendment has not altered the position as determined by the Federal Court in affirming this court's decision in *Mayaria*.

Questions Of Law Raised In This Appeal

[11] TNB then sought leave to appeal to the Federal Court. On 22 June 2020, leave to appeal was granted. Ordinarily, leave will not be granted in any interlocutory appeal unless, as it was shown in the present case, the matter involves questions of importance upon which further argument and a judgment of this court would be to public advantage (see *Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor And Other Applications* [2011] 1 CLJ 51; [2011] 1 MLJ 25, FC). For the benefit of the business or industry and large segment of the customers concerned, TNB was given leave to appeal to the Federal Court on three questions of law as follows:

A (1) "Whether the statutory power conferred on TNB under the amended s. 38(1) of the ESA to disconnect the supply of electricity can be prohibited by implied limitations on the exercise of power, namely that the power must be exercised immediately upon discovery of meter tampering and/or in any event, before the tampered meter is rectified".

B (2) "Whether TNB's exercise of the statutory power to disconnect the supply of electricity under the amended s. 38(1) of the ESA can be precluded or prevented without express prohibitions in the ESA on the exercise of such power".

C (3) "Whether under the amended s. 38(4) of the ESA, it is a prerequisite for TNB to disconnect electricity supply before it is able to issue the statutory written statement to its consumer and rely upon the same as *prima facie* evidence of the payment that has to be made by the consumer under s. 38(3) of the ESA.

Questions 1 And 2

D **[12]** Questions 1 and 2 essentially relate to the same issue as to whether under the amended s. 38(1) of the ESA, TNB is prohibited from disconnecting electricity supply to the consumer after it discovers meter tampering and rectifies the meter. The questions arise in the context of the E irrefutable facts that TNB had inspected its meter at the premises of the second respondent and discovered meter tampering. The meter was rectified by TNB and subsequently, TNB issued a notice of disconnection of supply to the second respondent's premises.

TNB's Arguments

F **[13]** At the hearing before us, the arguments of learned counsel for TNB in relation to questions 1 and 2 can be summarised as follows. On the pre and post-amendment of s. 38(1) of the ESA issue, he argued that the amended s. 38(1) already expressly imposes further and additional prohibitions and limitations. Those are:

G (i) a further condition namely a prohibition where TNB or person duly authorised by TNB shall within three working days from the date of such finding inform the Energy Commission in writing;

(ii) a modification to existing condition namely a prohibition was the H issuance of notice of not less than 48 hours' notice to disconnect shall be made where previously it was 24-hour notification; and

(iii) further limitation in existing limitation under s. 38(2) where the Energy Commission can order TNB to reconnect the disconnected supply. This was provided under sub-s. (1B). Existing limitation is that the I disconnection can only be for a maximum period of three months.

[14] The next argument by learned counsel is that analogous to the reading of the amended s. 38(1), no implied prohibition or limitation may be read into except the existing express prohibition and limitation provided. It is therefore clear that if Parliament intended to prohibit or limit TNB's powers, it must expressly legislate so through an amendment. It was argued that the Federal Court decision in *Tenaga Nasional Bhd v. Mayaria Sdn Bhd* (Civil Appeal No. 02 (f)-28-05-03-2017(W)) ("*Mayaria* FC") did not apply to the present case as that case was decided prior to the amendment to s. 38(1).

[15] It is the thrust of his submission that this appeal should be allowed because TNB had fulfilled all the express conditions stipulated under s. 38(1) to lawfully disconnect the electricity supply. He supported this submission with a number of points as follows. In the face of a clear statutory scheme of express conditions for the exercise of the power to disconnect and the express limitations on the exercise of the power, it cannot be implied that the exercise of the power is prohibited/lost once the meter is rectified. This would be an attempt to "fill the gap" in the legislation, which is impermissible. In construing a statute, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. He submitted that the court is not entitled to read words into a statute unless clear reasons for it is to be found in the statute itself citing *Union of India v. Deoki Nandan Aggarwal* AIR 1992 SC 96, SC; *Union of India v. Kanahaya Lai Sham Lai* AIR 1957 P H 117, HC; *Butool Begum v. The State* AIR 1956 Hyderabad 26, HC; *Vengadasalam v. Khor Soon Weng & Ors* [1985] 1 LNS 46; [1985] 2 MLJ 449, SC; *The Registrar, University of Madras v. The Union of India* (1995) 2 MJ 367; *Dwarika Prosad v. Dr. B.K Roy Choudhary* AIR 1950 Cal 349.

Respondents' Arguments

[16] The respondents' counsel put forward an argument as follows. In a careful analysis of the law, he submitted that there is no difference in consequences arising from the pre and post-amendment of s. 38(1) of the ESA. Hence, he argued that both the questions had been determined by the Federal Court in *Mayaria* FC (*supra*) on 4 September 2019. According to learned counsel, it is an undeniable fact that the Federal Court had affirmed the Court of Appeal's decision and dismissed the TNB's appeal based on the similar issue that whether TNB can invoke s. 38(1) of the ESA to disconnect electricity once the impugned meter had been rectified and/or replaced. It was further submitted that the Federal Court had decided on 4 September 2019 that once the impugned meter had been rectified and/or replaced, TNB can no longer invoke s. 38(1) of the ESA to disconnect electricity supply to a customer's premises. The Federal Court's decision in *Mayaria* FC (*supra*), it was submitted, remains a potent law and ought to be followed. It was therefore contended that the notice of disconnection by TNB issued under s. 38(1) was unlawful and void.

A *Our Determination*

[17] As a starting point in our analysis, we need to say something about the scheme of the ESA. TNB is a licensee and it has vast and extensive powers to take action in the event of offences committed under the legislation. The ESA criminalises theft or pilferage of electricity and any form of interference
B with TNB's installation of meters (see sub-ss. 37(1), (3) and (14) of the ESA). Under the ESA, upon inspection and discovery of such unlawful acts or offences, TNB has the power to disconnect the supply of electricity to the consumer's premises upon giving the requisite statutory notice (see *Tenaga Nasional Bhd v. Evergrowth Aquaculture Sdn Bhd & Other Appeals* [2021] 9 CLJ
C 179; [2021] 5 MLJ 937, FC ("*TNB v. Evergrowth*")).

[18] The main focus of the two questions concerns TNB's statutory powers to disconnect the supply of electricity under the amended s. 38(1). But it is important we first set out the former s. 38(1) of the ESA. This will give context to the present appeal. Prior to 1 February 2016, the provision read:
D

> 38(1). Where any person employed by a licensee finds upon any premises evidence which in his opinion proves that an offence has been committed under subsection 37(1), (3) or (14), the licensee or any person duly authorised by the licensee may, upon giving not less than twenty-four hours' notice, in such form as may be prescribed, cause the supply of
E electricity to be disconnected from the said premises.

[19] We would observe at this point that a number of High Court cases that were brought to our attention by learned counsel for the respondents had decided that once a tampered meter had been rectified by TNB and the offence of meter tampering was no longer continuing, TNB had no power to
F issue the notice to disconnect under the pre-amended s. 38(1). In *Modernria* (*supra*), it was held that once the impugned meter had been replaced, there was no power to issue the notice to disconnect as the act of replacing the impugned meter with a new meter had brought the nefarious conduct to an end. In *Mayaria* HC (*supra*), it was held that TNB loses its statutory power
G to disconnect electricity supply under s. 38(1) once the tampered meter had been replaced and the offence under s. 37 was no longer continuing and if the loss of revenue is to be recovered, then it can be done by way of a civil action under s. 38(5). Disconnection of electricity in the event of non-payment was bad in law. In *Xin Guan Premier* (*supra*), it was held that
H TNB could only lawfully disconnect electricity supply when the offence is still continuing and conversely barred if it has since ceased. In *Big Man Management Sdn Bhd v. Tenaga Nasional Bhd* [2020] 8 CLJ 27; [2020] 11 MLJ 472, HC, it was held that since TNB had rectified the impugned meter and/ or installed a new meter, the purpose ie to halt and prevent further losses to
I TNB had been achieved. As there was no longer any urgency, TNB had no authority to disconnect electricity supply to the consumer's premises. All these decisions of the High Court do assist us in our deliberation and determination.

[20] The same issue which has arisen in this appeal has also been the subject matter of several appeals before the Court of Appeal. The decision of the Court of Appeal in *Mayaria* CA (*supra*) is consistent with the High Court decisions discussed earlier. We should point out once more that *Mayaria* CA (*supra*), however, was decided prior to the amendment. The Court of Appeal in *Mayaria* CA (*supra*) held that at the time of the disconnection, the tampering of the meter had been rectified, and there was no basis of any further loss. As such, the Court of Appeal decided that TNB had neither basis nor authority to disconnect the electricity supply. The Court of Appeal explained at paras 32-34:

> [32] A reading of both ss. 38(1) and 38(3) demonstrate that the power given to TNB by s. 38(1) is to limit any loss suffered by TNB by an under-billing of electricity consumption. In the present case, there was no issue of further losses as TNB had already replaced the alleged tampered meter three months prior to the issuance of the statutory notice of disconnection and the notice of demand.
>
> [33] ...
>
> [34] ... Thus, the defendant has no authority to disconnect electricity supply or to terminate electricity supply in the event payment of RM1,000,350.98 is not made within 24 hours of the issuance of notice. Sections 38(1) and 38(3) of the Act does not authorise TNB to do so.

[21] Our attention was then drawn to the case of *Karun Klasik Sdn Bhd v. Tenaga Nasional Bhd* [2018] 9 CLJ 184; [2018] 3 MLJ 749 ("*Karun Klasik*") where the Court of Appeal took a different approach and held at para 91:

> [91] We are therefore unable to concur with the decisions in *Modernria* and *Mayaria* that the power to disconnect electricity under s. 38(1) cannot be utilised when tampering has been rectified and there is only an amount due and outstanding by the consumer to the licensee.

[22] These conflicting decisions of the two Court of Appeals in *Mayaria* CA (*supra*) and *Karun Klasik* (*supra*) were later resolved by this court when the two cases were heard together on appeal. As we have indicated earlier, on 4 September 2019 this court upheld the decision of the Court of Appeal in *Mayaria* CA (*supra*) and reversed the Court of Appeal's decision in *Karun Klasik* (*supra*). Unfortunately, the Federal Court has not provided the written grounds for these decisions. We would observe at this juncture, that it was not open to the Court of Appeal in *Karun Klasik* (*supra*) to depart from its earlier decision in *Mayaria* CA (*supra*), which was decided earlier as the rule of legal precedence must be followed in the interest of certainty (see *Young v. Bristol Aeroplane* [1944] KB 718, *P H Hendry v. George John De Cruz* [1949] Supp MLJ 25, *Davis v. Johnson* [1978] 1 All ER 1132 and *Kejuruteraan Bintai Kindenko Sdn Bhd v. Fong Soon Leong* [2021] 5 CLJ 1; CA ("*Kejuruteraan Bintai Kindenko*"). We will say more about the importance of obedience of

judicial precedence in the later part of our judgment. Even though the Federal Court has not provided the written grounds, the extract of the brief reasons provided by the Federal Court in *Mayaria* FC (*supra*) as recorded on the CMS system reads, *inter alia*, as follows: "We agree with the COA's interpretation of s. 38(1) in case no. 9 – *Mayaria* case that the power of disconnection is lost once the tampered meter is rectified." It is therefore clear as to what was decided earlier by this court on this matter.

[23] Up to this point, we have been mainly considering the position of the law in respect of the pre-amended s. 38(1) of the ESA. As decided by this court in *Mayaria* FC (*supra*), TNB cannot lawfully disconnect the supply of electricity to a customer's premises pursuant to s. 38(1) after the impugned meter has been rectified and replaced with a new meter. This is the position of the law prior to the amended s. 38(1). The law is settled in cases of this genre.

[24] It is against the above background, it was strenuously argued before us by learned counsel for TNB that our decision in *Mayaria* FC (*supra*) did not apply to the current case because it was decided prior to the amendments made to the ESA; while in the present case, since TNB's inspection and discovery of the meter tampering was made on 7 June 2016, the current s. 38(1) applied. This is his main argument. The Court of Appeal as it was contended, failed to identify any prohibition against the exercise of the statutory power to disconnect after rectification of the meter, under the amended s. 38(1). This main argument by learned counsel for TNB was never really new. This was substantially the argument raised by TNB before this court in *Mayaria* FC (*supra*), even though as we have earlier noted that *Mayaria* FC (*supra*) was decided on the basis of s. 38(1) before its amendment. However, the new thing about the argument before us is its tone, manner and emphasis.

[25] To address the arguments of learned counsel, from this point on, we shall deal with s. 38(1) after its amendment which now reads:

> 38(1) Where any person employed by a licensee finds upon any premises evidence which gives reasonable grounds for him to believe that an offence has been committed under subsection 37(1), (3) or (14), the licensee or any person duly authorised by the licensee shall within three working days from the date of such finding inform the Commission in writing, and the licensee may, upon giving not less than forty eight hours' notice from the same date in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.

[26] The said amendment came into effect on 1 January 2016. It is common ground that the present case before us falls to be decided in accordance with s. 38(1) after its amendment. Given the circumstances, the central question which we must therefore ask here is whether the amendment

to s. 38(1) had altered the position of law as decided by this court in *Mayaria* FC (*supra*). The question must be approached on the basis of the wordings of the amendment. We note three things about the amendment. First, the phrase "in his opinion" was replaced with "gives reasonable grounds for him to believe". Secondly, the words "twenty-four hours' notice" were substituted with "forty-eight hours' notice". Thirdly, an additional statutory requirement is imposed on TNB to "within three working days from the date of such finding inform the Commission in writing". We agree with the submissions of learned counsel for the respondents that when Parliament replaced the word "in his opinion" with the expression "reasonable grounds for him to believe", it was intended that TNB is subjected to a higher standard of proof, which is a higher evidential threshold. It is also clear to us that the legislative intention behind the amendment to increase the period of notice to be given to consumers from 24 hours to 48 hours is to give further protection to the consumers by giving the consumers longer time to prepare for the disconnection. The additional statutory requirement to include the involvement of the Electricity Commission serves to inform the Commission of TNB's finding and allow the Electricity Commission to intervene and verify TNB's finding as to whether an offence has indeed been committed. Viewed in this way, the amended s. 38(1), is an enhancement on the protection to the consumers. As a matter of fact, the amended s. 38(1) renders it more onerous and stringent for TNB to disconnect electricity supply.

[27] In our opinion, there is no substantive distinction between the pre and post-amendment of s. 38(1). All the differences that we have noted above are neither significant nor relevant in the context of the issues that we have to decide in the instant appeal. More significant still, the operative words "finds" and "cause the supply to be disconnected from the said premises" appear in both the former and current provisions. In the later part of our judgment, we discuss the significance of these words. Regardless of the amendment made to s. 38(1) and having regard that the amendment is intended to enhance the protection to TNB's consumers, in our judgment, the current s. 38(1) has not altered the position of law in *Mayaria* FC (*supra*). In this connection, Evrol Mariette Peters JC in *QL Endau Marine Products Sdn Bhd v. Tenaga Nasional Bhd* [2020] 1 LNS 1643; [2021] 7 MLJ 79, HC is correct to decide in that respect.

[28] In those circumstances, we find ourselves in agreement with the Court of Appeal in the present case that the amendment had not altered the position as determined by this court in affirming the Court of Appeal's decision in *Mayaria* FC (*supra*). It is clear to us that in substance, the issue in questions 1 and 2 in the present appeal is the same issue that came up before the Federal Court in *Mayaria* FC (*supra*). The relevant question of law that was considered by this court in *Mayaria* FC (*supra*) reads: "Whether the statutory power

conferred on Tenaga Nasional Berhad ("TNB") to disconnect electricity supply under s. 38(1) of the Electricity Supply Act 1990 ("the Act") in cases of meter tampering is subject to the implied condition that it must be exercised immediately upon discovery and/or in any event before the meter has been rectified?". This court had affirmed the Court of Appeal's decision in *Mayaria* CA (*supra*) and dismissed the TNB's appeal, based on the relevant issue whether TNB can invoke s. 38(1) to disconnect electricity once the impugned meter had been rectified and/or replaced. As such in our judgment, the position of the law now, as then, is that once the impugned meter had been rectified and/or replaced with a new meter and TNB no longer suffers losses, TNB cannot lawfully invoke the amended s. 38(1) to disconnect electricity to the consumer's premises.

[29] As can be seen, our discussion thus far is sufficient to dispose of questions 1 and 2. Nonetheless, as an alternative argument, learned counsel for TNB made a bold submission. He cited the case of *Merck Sharp & Dohme Group & Anor v. Hovid Bhd* [2019] 9 CLJ 1; [2019] 12 MLJ 66, FC where it was observed that the Federal Court may depart from its previous ruling when the previous decision is "wrong, uncertain, unjust, outmoded or obsolete". It was much pressed in argument by learned counsel that we should revisit our decision in *Mayaria* FC (*supra*) implying that our judgment in *Mayaria* FC (*supra*) was wrong. There is much that is unacceptable in his arguments.

[30] We will say at once that overturning our own precedent is a serious matter. This court must always respect its own precedents. The rule of legal precedence must be followed in the interest of certainty. Great sanctity must be attached to the finality of our judgment. This is not to say that this court should never depart from an earlier decision. We do not blindly honour *stare decisis*. While it is true that we can overturn our own precedent in exceptional cases where it is really necessary, as an apex court, we need to be cautious about departing from our own earlier decision especially in a case that concerns the interpretation of a legislative provision, lest we lose the trust of public by persistent shifts of laws. The law is about stability, predictability and certainty that allow the public and the business community to plan and organise their lives based on the previous precedent. A degree of certainty, consistency and predictability in the law is one of the foundations upon which our justice system operates. Therefore, we remind ourselves that it is of utmost importance this court adheres to its past rulings. In *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577, FC, Arifin Zakaria CJ in delivering the judgment of this court reminded us at para 35:

> [35] ... It is of supreme importance that people may know with certainty what the law is, and this can be attained by a loyal adherence to the doctrine of *stare decisis*. Little respect will be paid to our judgments if we overthrow that one day which we have resolved the day before.

[31] In the later part of his judgment His Lordship added at para. 50: A

> [50] ... I would think that this court must follow its own proclamation of law made earlier on other cases and honour these rulings. After all, this court is the highest court in the country.

[32] This brings us to the recent decision of this court in *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153; [2020] 2 MLJ; FC where we said at para. 83 (CLJ); para. 17 (MLJ): B

> [83] Indeed, the doctrine of *stare decisis* dictates that as a matter of a general rule of great importance the Federal Court is bound by its own previous decisions. However, there are exceptional circumstances that allow them to depart from the earlier decision, but such power must be used sparingly. C

[33] In another part of the judgment we further said at para. 79 (CLJ); para. 13 (MLJ):

> [79] ... Any decision of the Federal Court must be treated with utmost deference. More significantly, in my opinion, it is not a good policy for us at the highest court of the land to leave the law in a state of uncertainty by departing from our recent decisions. That will put us in a bad light as the Federal Court will then purports to be in a state of quandary when deciding a case. It is also a bad policy for us to keep the law in such a state of uncertainty particularly upon a question of interpretation of a statutory provision that comes up regularly for consideration before the courts. D E

[34] While still on the subject of the importance of obedience of judicial precedence, the point is aptly put by Darryl Goon Siew Chye JCA, to which we respectfully agree, in delivering the latest judgment of the Court of Appeal on this subject matter in the case of *Kejuruteraan Bintai Kindenko* (*supra*) as follows at para. 72: F

> [72] ... While judges may no doubt sincerely have differences in views, there is also public interest to consider. It would be a lamentable state of the law if members of the public, in whatever sector, are unable to secure legal advice of sufficient certainty in order to properly conduct or regulate their affairs because of a confusing melee of conflicting legal decisions by the courts. G

[35] There is another point raised by learned counsel that we must now address when he argued that we should depart from *Mayaria* FC (*supra*). He urged us to adopt the analysis and approach taken by the Court of Appeal in *Karun Klasik* (*supra*) in support of the exercise of the power. To this, we want to say that the decision by this court in *Mayaria* FC (*supra*) to reverse the Court of Appeal's decision in *Karun Klasik* (*supra*) is, with the greatest of respect, correct as the decision of the Court of Appeal is flawed for the following four reasons. First, the Court of Appeal in *Karun Klasik* (*supra*) held that it was unable to concur with the reasoning in *Modernria* (*supra*), *Mayaria* H I

HC (*supra*) and *Xin Guan Premier* (*supra*) and held that TNB is entitled to disconnect the electricity supply even after the tampered meter has been removed or where the theft appears to have ceased. However, the Court of Appeal, nevertheless, on numerous occasions, referred to the existence of an offence and/or a continuing offence in support of its decision. Secondly, the Court of Appeal appears to have read into s. 38(1) an additional category of offence that would enable TNB to invoke the said section ie, failure to pay the back charges for the stolen electricity (loss of revenue). Thirdly, the Court of Appeal held that TNB should also be allowed to invoke s. 38(1) for non-payment since TNB also has the power to disconnect electricity supply to consumers who have failed to pay their electricity bill. However, the Court of Appeal failed to appreciate the fact that unlike the present case, reg. 4 of the Licensee Supply Regulations 1990 ("LSR 1990") expressly allows TNB to disconnect the supply of electricity under such circumstances. Fourthly, the Court of Appeal had gone to lengths to give interpretation to the word "after" in s. 38(1). At para. 72 of the judgment, the court said "What perhaps is less than clear and forms an important core of the reasoning in *Modernria*, *Mayaria* and *Xin Guan* is that: The word "after" in s. 38(1), read in the context of the commissions of an offence under s. 37, cannot mean in perpetuity after discovery of the "offence". At para. 74 the court added "The word "after" ought to be given a reasonable, judicious and rational construction which will depend to a large extent on the particular facts of a case. It would be futile to prescribe a specified period as amounting to the outer limits of time accorded to the licensee, save to state that the section clearly does not envisage a period that is too long in the context of a particular case, and far less, perpetuity". The point we want to make is this. As can be seen from the provisions of s. 38(1), the word "after" does not exist in the section at all neither before nor after its amendment. The Court of Appeal had erred by putting much emphasis on the construction of a word that does not even exist in the statute under examination.

[36] Learned counsel for TNB also referred to the case of *Adil Juta Sdn Bhd v. Tenaga Nasional Bhd* [2014] 1 LNS 1022; [2015] 9 MLJ 379; HC to support his contention that it could not be the intention of Parliament that a meter tamperer could deprive TNB of its statutory power to disconnect under the new s. 38(1) simply by rectifying the tampering. Such an interpretation, it was argued, would lead to practical difficulties for TNB's operations. In that case, TNB discovered tampering but could not undertake corrective action because none of the plaintiff's employees was around at the particular time. When TNB's inspection team returned the next day, they were refused entry by the plaintiff's workers and were asked to come back four days later. When they did return four days later, the inspection team discovered that the plaintiff had rectified the tampering. We think TNB is overstating its case.

There does not seem to us the difficulties which learned counsel suggested. In the first place, the entry and inspection exercise for the purpose of s. 38(1) is less stringent as we have already decided in *TNB v. Evergrowth* (*supra*) that there is no requirement to comply with ss. 5 and 6 of the ESA out of the independency of ss. 37 and 38. TNB is permitted by virtue of reg. 7 of the LSR 1990 to make an entry and inspection. What is pertinent, is the finding of evidence of meter tampering to enable TNB to be empowered for an electricity disconnection. It is true that rectified tampered meter is no evidence for the purpose of disconnection. But in the event TNB cannot lawfully disconnect the supply of electricity after the impugned meter has been rectified, TNB is not left without remedy. By way of a civil action, TNB can recover any loss of revenue incurred as a result of the meter tampering. In this regard, photograph evidence of tampering of the impugned meter obtained prior to rectification during an entry and inspection and any evidence therefrom, is among others, constitute sufficient evidence to support TNB's civil action. Moreover, in circumstances where repeated offending consumers pilfering electricity either by repeating the offence or by surreptitious and devious play of rectification, s. 37 provides a recourse namely, a criminal prosecution in accordance with the requirement of the ESA for the purpose of punishing the offending consumers.

[37] To return to the point concerning the rule of judicial precedence, it is indeed a bad policy for us at the apex court, in this case, to leave the law in a state of uncertainty by departing from our recent decision in the case of *Mayaria* FC (*supra*) on this very same issue. What's more, with respect, the decision in *Mayaria* FC (*supra*) is correct and would govern the present appeal. We are not at all persuaded by TNB's submission that our decision in *Mayaria* FC (*supra*) is wrong and ought no longer to be applied. We find no valid reason to depart from the views that we had held in *Mayaria* FC (*supra*). The matter before us is purely a legal one involving legislative interpretation of s. 38(1). TNB's case must stand and fall on the basis of this specific provision. The primary issue for our consideration is the interpretation of the powers of TNB to disconnect the supply of electricity pursuant to s. 38(1). Our task is to give full effect to the provisions that the Legislature had enacted (see *Mesuma Sports Sdn Bhd v. Majlis Sukan Negara Malaysia; Pendaftar Cap Dagangan Malaysia (Interested Party)* [2015] 9 CLJ 125; [2015] 6 AMR 314, FC and *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561; [2020] 4 MLJ 721, FC). We are bound to construe a provision in a legislation according to the plain meaning of the language used. We begin our task of interpretation by carefully considering the language used. It is necessary to read the wordings and purport of the provision with great care. The first important point to note is that from the reading of s. 38(1) before and after its amendment, one can unmistakably note that the operative word, "finds", remains the same before and after its amendment. It is to be noted that the operative word is in its present tense, ie, "finds"

A and not in its past tense, "found". The choice of words "[w]here any person employed by a licensee finds upon any premises evidence which gives reasonable grounds for him to believe that an offence has been committed ..." is very clear to indicate that the requirement of finding of meter tampering is the singular factor to trigger powers of disconnection. This is the basic
B condition that must be fulfilled to invoke the power of disconnection. The evidence requirement constitutes the pillar of the scheme of the statutory power for TNB as the licensee to disconnect electricity upon finding of an offence under sub-ss. 37(1), (3) and (14) of the ESA. The other conditions or requirements only become relevant if this basic condition is satisfied. Not
C the other way round. As we have observed in *TNB v. Evergrowth* (*supra*) "under the scheme of the provisions of s. 38, an important point to note is that the licensee such as the TNB, or by anyone it employed once they enter inspect and make finding of any evidence of the consumer committing any offence under sub-ss. 37(1), (3) and (14) shall inform the EC within a
D prescribed time to cause the disconnection of the electricity supply in the consumer's premises". It is clear and plain that only by a finding of evidence of meter tampering, TNB is empowered for disconnection, subject to subsequent limitation and prohibition expressly provided. If there is no evidence of meter tampering, there is no offence committed and there is no lawful power for disconnection. This clearly shows that Parliament intends
E for the subsequent action to be taken presently, urgently and expeditiously (ie, immediately upon discovery of any tampering) and not in the future (ie, long after discovery of any tampering, much less after the tampered meter has been rectified and/or replaced). When one carefully looks at the provisions, what stands out is that s. 38(1) forms on one specific time frame
F and process. It begins from the finding of evidence of offence, fulfilling prescribed requirements and completed by the cause of disconnection. One single sentence of the provision, forms the complete processes which TNB had to follow in achieving the power of disconnection. The grammatical construction of "an offence has been committed" to negate the continuing
G and existing offence as suggested by the Court of Appeal in *Karun Klasik* (*supra*), in our opinion, is far less persuasive because the contextual plain meaning forms the specific processes leading to "cause the supply of electricity to be disconnected from the premises". It is in this aspect that there must be a continuing offence to invoke the power disconnection. It
H must necessarily follow, where there is a further discovery of meter tampering after rectification is done of the previous tampering, TNB can immediately utilise the power of disconnection under s. 38(1) provided that it takes no step to all over again rectify the subsequent tampering. That was never the case here.

I **[38]** In the present case, as far as the evidence goes, all that the evidence shows is that when TNB issued the notice of disconnection, there was no longer any issue of meter tampering at the respondents' premises as the

alleged unlawful activity had already ended due to the rectification and replacement of the impugned meter with a new meter, and electricity was continued to be supplied after that. The tampered meter was remedied on the same day of inspection and discovery by TNB. The unauthorised interference of the meter at the respondents' premises had been discontinued and thus any further presumed loss of electricity ceased to be an issue. When the notice of disconnection was served on the respondents, there was no longer any defective meter or offending device to facilitate the continuation of offence under s. 37(1) as rectification work was carried out and completed by TNB. The facts of the present case show that the alleged offence under s. 37(1) is a past offence. It bears repeated emphasis that after rectification and replacement on 7 June 2008, there was no issue of any offence being committed since the supply of electricity to the premises was properly and accurately recorded. The language of s. 38(1) does not allow for future disconnection of electricity in circumstances where the offence under s. 37(1) was in the past and is no longer being continued. Flowing from the provisions, we should emphasise that for the notice of disconnection issued by TNB against the respondents to be good in law under s. 38(1), the offence under s. 37(1) must still be on-going or continuing. In this regard, we agree with the observation made by Nantha Balan JC (as he then was) in *Modernria* (*supra*) as follows:

> [25] Thus, if counsel for TNB is right, then the consumer whose meter has been replaced, is at risk at any time after the event of discovery of the offence, of having the supply of electricity disconnected. This is a curious position for TNB to take because it means that even though they have replaced the tampered meter with a new meter and the usage of electricity consumption is being properly recorded, TNB could at any time thereafter (ie, weeks and months or years later) invoke s. 38(1) of the Act and predicate it on a previous offence which is no longer being perpetuated.

[39] Therefore, once the impugned meter has been replaced and the offence under s. 37(1) is no longer extant, TNB does not have the valid power to issue the notice of disconnection under s. 38(1). If the loss of revenue is to be recovered, then it can be done by way of a civil action under s. 38(5). Section 38(1) was enacted to give TNB effective powers to instantly prevent any offence that may be committed and not to be left unattended or unabated. It empowered TNB to act expeditiously to prevent misuse such as electricity theft and to give TNB the power to act swiftly to prevent further loses (see *Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd* [2006] 4 CLJ 892, CA and *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478, FC). We agree with the observation made by Mohd Nazlan JC (as he then was) in *Xin Guan Premier* (*supra*) that TNB's power to disconnect electricity pursuant to s. 38(1) is both immediate and interim in nature. On the facts of the present case, there is no longer any continuation of meter tampering and

there was no subsisting offence under s. 37(1) which authorises TNB to use its disconnection power of electricity under s. 38(1) to the respondents' premises.

[40] Ultimately, it is a question of balancing competing interests. The evidence finding factor holds neither the TNB the untrammelled powers in exercising their powers to disconnect electricity to the consumers, nor the consumers have the opportunity to connive and be exonerated from the offence of meter tampering. For TNB, evidence "which gives reasonable grounds for him to believe that an offence has been committed" is contingent upon its "subjective finding" for "finding of metal clamp affixed is sufficient" according to *TNB v. Evergrowth* (*supra*) to warrant for the disconnection of electricity supply. TNB is still accorded the right to recover the loss of revenue by way of a civil action under s. 38(5) or by pursuing criminal prosecution against errant consumers who surreptitiously and deviously rectified the tampered meter. In our judgment, this is the balance of the competing interest which the scheme of the ESA seeks to uphold. In exercising its statutory power, TNB is not imposed to make as what *Karun Klasik* (*supra*) held, that TNB "is accorded two mutually exclusive choices either to note the tampering but leaves the metered tampered or halts tampering but loses power to disconnect" because the only "statutory choice" in s. 38(1) exists, is indeed the "first option". There is no express prohibition for rectification to be taken place nor there is requirement for TNB to act so for the purpose of disconnection of electricity. As discussed earlier, the power to disconnect operates on a specific time frame and processes under s. 38(1). To diminish the basic requirement of s. 38(1) is to cease the said provision from operating. What is expressly provided is no more ambiguous. Section 38(1) of the ESA, as we have seen, requires evidence of meter tampering to justify disconnection, that is to say, once the impugned meter has been rectified, there is no longer any issue of meter tampering and thus the offence under s. 37(1) is no longer extant. Nowhere in the ESA is it stated that TNB may proceed under s. 38(1) to compel payment for the loss of revenue. The only recourse available to TNB in such a situation is provided for under s. 38(5) where it allows TNB to file a civil action for the recovery of loss of revenue. TNB cannot have the best of both worlds and a second bite of the cherry fruiting from their deliberate course of action. Where a statute creates a right and, in plain language, gives a specific remedy for its enforcement, a party seeking to enforce the right must resort to that remedy and not to others (see *Manggai v. Government of Sarawak & Anor* [1970] 1 LNS 80, FC and *Wilkinson v. Barking Corp* [1948] 1 KB 721).

[41] In consequence and in light of all the above, our answers to the legal issues posed under questions 1 and 2 are as follows. TNB has no lawful power to disconnect a consumer electricity supply pursuant to the current s. 38(1) of the ESA once the impugned meter has been rectified and replaced, and the offence under s. 37 is no longer subsisting and cease to exist at the material time when the notice of disconnection is issued to the customer.

[42] We come then to question 3, which raises a different point.

Question 3

[43] The point here is a very short one. This question relates to the issue as to whether TNB must disconnect the supply of electricity under the amended s. 38(1) of the ESA before it can rely on the written statement in s. 38(4), which provides:

> (4) A written statement by an employee of the licensee duly certified by the licensee or any person authorised by the licensee specifying -
>
> (a) The amount of loss of revenue or the reasonable expenses incurred by the licensee;
>
> (aa) The manner of calculation of the loss of revenue and items of expenses; and
>
> (b) The person liable for the payment thereof,
>
> shall be *prima facie* evidence of the payment that has to be made by the consumer under subs. (3) and such written statement shall be notified to the consumer within fourteen working days or any period as extended with the written approval of the Commission after the disconnection.

[44] Under the amended s. 38(4), the words "after the disconnection" appear to impose a disconnection before the written statement is prepared and provided to the consumer. This requirement is not found in the pre-amended s. 38(4) which provides:

> (4) A written statement by an employee of the licensee duly certified by the licensee or any person authorised by the licensee specifying;
>
> (a) The amount of loss of revenue or the expenses incurred by the licensee; and
>
> (b) The person liable for the payment thereof
>
> shall be *prima facie* evidence of the payment that has to be made by the consumer under subs. (3).

Our Determination

[45] We can deal with question 3 more briefly as both sides have submitted that the question posed should be answered in the negative.

[46] The first point to note is that the written statement under s. 38(4) is for the purposes of TNB's civil action for recovery of loss of revenue under s. 38(5). It stands as the *prima facie* evidence of the payment that must be made by the consumer under s. 38(3). Parliament had intended to give TNB an evidential advantage *via* the written statement (see *Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals* [2018] 3 CLJ 557; [2018] 3 MLJ 141, FC). The amount stated in it is *prima facie* evidence of the loss of revenue that the consumer must pay for meter tampering.

[47] As we have seen earlier, the amended s. 38(1) provides that "the licensee ... may upon giving not less than forty eight hours' notice ... cause the supply of electricity to be disconnected from the said premises". Clearly, TNB has the discretion to choose whether to exercise the power to disconnect the supply of electricity to the consumer's premises upon giving the requisite statutory notice. Viewed in this way, this requirement in the amended s. 38(4) appears incongruous with the amended s. 38(1), which retains TNB's discretion to disconnect. This would lead to an unworkable situation where TNB would need to disconnect in every circumstance that it wishes to rely on the written statement as *prima facie* evidence under s. 38(4) when bringing a civil claim under s. 38(5), or wishes to at least have the option to do so.

[48] In our view, the amended s. 38(4) operates in this manner. In the event of disconnection, should TNB comply with the requirement under s. 38(4) in issuing the written statement within 14 days after disconnection, TNB will enjoy *prima facie* advantage accorded to them. It is clear to us that the provision sought to impose a time limit on TNB to issue a written statement to its consumers only in the event of disconnection, but no restriction is imposed on TNB if there is no disconnection. Hence, in the event of no disconnection, TNB can still issue the written statement for loss of revenue under s. 38(4) and claim for such loss in civil court. No time limit or restriction is imposed on TNB to issue the written statement in event of no disconnection and TNB retains the benefit of *prima facie* advantage under s. 38(4). We agree with the submissions of learned counsel for TNB that it would be absurd to require TNB to disconnect supply for the sake of relying on the written statement. It would also be contrary to the intention of Parliament in amending s. 38(1) that there can only be disconnection in clear and proven cases of electricity theft under the ESA.

[49] Based on the above, question 3 should be answered in the negative.

Conclusion

[50] In all those circumstances, we reach the conclusion that this appeal must fail. We would therefore dismiss this appeal with costs.